

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period January 1, 2012 through October 12, 2019, without an appropriate offset; and (2) whether OWCP properly denyie waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On April 16, 2010 appellant, then a 61-year-old security guard, filed a traumatic injury claim (Form CA-1) alleging that on April 13, 2010 she sustained injuries to her right shoulder and upper back when she was involved in a physical altercation while in the performance of duty. Her retirement coverage was listed as Federal Employees Retirement System (FERS).

On June 14, 2010 OWCP accepted the claim for right shoulder and upper arm contusion, rib, and neck sprain. On December 15, 2010 it expanded acceptance of the claim to include adjustment disorder, with depressed mood, and sprain of the right shoulder, upper arm, and acromioclavicular joint. OWCP paid appellant wage-loss compensation on the supplemental rolls as of May 29, 2010 and on the periodic rolls beginning July 3, 2011.

On July 13, 2019 OWCP forwarded a FER/SSA dual benefits calculation form to SSA. It received the completed form on July 18, 2019. OWCP noted that appellant had several periods during which she received SSA disability benefits and converted back to retirement benefits, only to convert back to disability and then back to retirement at her full retirement age. The SSA form showed benefit rates with and without a FERS offset. Beginning January 2012, the SSA rate with FERS was \$859.20 and without FERS was \$826.40, beginning December 2012, the SSA rate with FERS was \$873.80 and without FERS was \$840.40, beginning February 2013, the SSA rate with FERS was \$873.80 and without FERS was \$840.40, beginning September 2013, the SSA rate with FERS was \$907.50 and without FERS was \$826.10, beginning December 2013, the SSA rate with FERS was \$921.10 and without FERS was \$838.50, beginning February 2014, the SSA rate with FERS was \$921.10 and without FERS was \$838.50, beginning March 2015, the SSA rate with FERS was \$1,139.30 and without FERS was \$1,095.80, beginning December 2015, the SSA rate with FERS was \$1,139.30 and without FERS was \$1,095.80, beginning December 2016, the SSA rate with FERS was \$1,142.70 and without FERS was \$1,099.00, beginning December 2017, the SSA rate with FERS was \$1,165.50 and without FERS was \$1,120.90, and beginning December 2018, the SSA rate with FERS was \$1,198.10 and without FERS was \$1,152.20.

In a worksheet dated December 12, 2019, OWCP calculated that appellant had received an overpayment of \$3,221.08 during the period January 1, 2012 through December 7, 2019. It found that during the period January 1 through November 30, 2012 the amount of the overpayment was \$364.45; from December 1, 2012 through February 28, 2013, \$97.91; from September 1, 2013 through November 30, 2013, \$105.00; from December 1, 2013 through February 28, 2014, \$100.88; from March 1 through November 30, 2015, \$398.90; from December 1, 2015 through November 30, 2016, \$530.90; from December 1, 2016 through November 30, 2017, \$517.42; from December 1, 2017 through November 30, 2018, \$541.48; and from December 1, 2018 through December 7, 2019, \$564.13.

On December 19, 2019 OWCP issued a preliminary overpayment determination that appellant was overpaid FECA benefits for the period January 1, 2012 through December 7, 2019,

in the amount of \$3,221.08, because she received SSA benefits as part of an annuity under FERS, concurrently with disability/wage loss compensation. It found that she was without fault in the creation of the overpayment. OWCP provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for appellant's completion. It informed her of the appeal actions she could take and allotted 30 days for response.

On January 13, 2020 appellant requested a precoupment hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated April 2, 2020, OWCP's hearing representative found that the case was not in posture for decision. The hearing representative found that it was not clearly documented how the SSA determined the periods of SSA disability and SSA retirement and how they arrived at their calculations. OWCP's hearing representative set aside the preliminary overpayment determination of December 19, 2019, as additional evidence was necessary from the SSA. The hearing representative noted that, upon return of the case file, OWCP should request evidence from SSA to document the periods of age-related benefits provided to appellant, how SSA calculated the age-related benefits, and the basis of the overpayment calculation. OWCP's hearing representative noted that, upon completion of the development of the evidence, OWCP should issue a *de novo* decision.

On October 1, 2020 OWCP finalized the December 19, 2019 preliminary overpayment determination. It found that, based upon the revised calculations from SSA regarding the periods of SSA disability and SSA age-related retirement benefits, the amount of the overpayment was \$3,146.57. OWCP found that during the period January 1 through November 30, 2012 the amount of the overpayment was \$364.45; from December 1, 2012 through February 28, 2013, \$97.91; from September 1 through November 30, 2013, \$105.00; from December 1, 2013 through February 28, 2014, \$100.88; from March 1 through November 30, 2015, \$398.90; from December 1, 2015 through November 30, 2016, \$530.90; from December 1, 2016 through November 30, 2017, \$517.42; from December 1, 2017 through November 30, 2018, \$541.48; and from December 1, 2018 through October 12, 2019, \$489.63. It determined that appellant was without fault in the creation of the overpayment. OWCP further found that the circumstances of her case did not warrant waiver of recovery of the overpayment as she had not completed the Form OWCP-20 or submitted any financial documentation. It declared that the sum of \$467.37 would be withheld from appellant's continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.<sup>3</sup> When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>4</sup>

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<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, OWCP will advise the individual in writing that the overpayment exists and the amount of the overpayment.<sup>5</sup> The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.<sup>6</sup> Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.<sup>7</sup> Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.<sup>8</sup> The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a prerecoupment hearing.<sup>9</sup> The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.<sup>10</sup> Failure to request the hearing within this 30-day time period shall constitute waiver of that right.<sup>11</sup>

### ANALYSIS

The Board finds that OWCP improperly issued its October 1, 2020 overpayment decision.

On December 19, 2019 OWCP issue a preliminary determination finding that appellant had received an overpayment of compensation in the amount of \$3,221.08 for the period January 1, 2012 through December 7, 2019. On January 13, 2020 appellant requested a prerecoupment hearing and disagreed with the preliminary overpayment determination. On April 2, 2020 an OWCP hearing representative explained that a preliminary review had been completed and it was determined that the case was not in posture for decision as the amount and period of the overpayment had not been fully explained. The hearing representative set aside the December 19, 2019 preliminary overpayment determination and returned the case for further development to be followed by a *de novo* decision.

OWCP further developed the claim and by decision dated October 1, 2020, issued a new, final overpayment decision, finding that appellant had received an overpayment of compensation in the amount of \$3,146.57 for the period January 1, 2012 through October 12, 2019, that she was without fault in the creation of the overpayment, and that she was not entitled to waiver of recovery. It noted that the sum of \$467.37 would be withheld from her continuing compensation payments.

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<sup>5</sup> 20 C.F.R. § 10.431(a).

<sup>6</sup> *Id.* at § 10.431(b).

<sup>7</sup> *Id.* at § 10.431(c).

<sup>8</sup> *Id.* at § 10.431(d).

<sup>9</sup> *Id.* at § 10.432.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

The Board finds that OWCP denied appellant due process in issuing the October 1, 2020 overpayment decision. The Board notes that OWCP routinely issues a new preliminary determination after an OWCP hearing representative reviews a preliminary overpayment decision and remands the case to OWCP for further findings.<sup>12</sup> In this case, OWCP did not issue a new preliminary determination advising appellant of its findings following the hearing representative's April 2, 2020 decision, which found that the case was not in posture for decision, set aside the preliminary overpayment determination, and remanded the case for further development. Instead, it finalized the overpayment adjusting the amount of the overpayment to \$3,146.57 for the period January 1, 2012 through October 12, 2019, without issuing a new preliminary determination. OWCP did not provide appellant with the right to challenge the new amount of overpayment or inform her whether she was entitled to waiver of recovery, thereby infringing upon her due process procedural rights.<sup>13</sup>

OWCP regulations provide that, before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of overpayment.<sup>14</sup> It must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, and the right to request a waiver of recovery of the overpayment.<sup>15</sup>

The preliminary notice of findings is essential in overpayment cases because OWCP regulations limit further review of a final decision concerning overpayment to the Board. A claimant is prohibited from requesting a hearing or reconsideration, following a final overpayment decision.<sup>16</sup> The claimant is, therefore, precluded from introducing new evidence to rebut findings made in a final overpayment decision.

The Board finds that, in the current case, appellant was not afforded her procedural rights to challenge the fact and new amount of overpayment and to request a waiver of recovery of the overpayment, or to submit new information regarding waiver of recovery of the overpayment.<sup>17</sup> Consequently, OWCP did not comply with the procedural rights under its regulations.<sup>18</sup>

Accordingly, the case will be remanded for OWCP to issue a preliminary determination regarding overpayment consistent with its own procedures.

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<sup>12</sup> See *K.G.*, Docket No. 17-0517 (issued September 8, 2017); see *N.N.*, Docket No. 14-0603 (issued July 22, 2014); *J.J.*, Docket No. 13-1905 (issued April 8, 2014); *L.B.*, Docket No. 12-1202 (issued February 6, 2013).

<sup>13</sup> 20 C.F.R. §§ 10.431, 10.432.

<sup>14</sup> *Id.* at § 10.431(a).

<sup>15</sup> *Id.* at § 10.431(d).

<sup>16</sup> *Id.* at § 10.440 (b).

<sup>17</sup> *Supra* note 15.

<sup>18</sup> *Supra* note 13; see also *K.H.*, Docket No. 11-603 (issued September 27, 2011); *K.G.*, *supra* note 12.

**CONCLUSION**

The Board finds that OWCP improperly issued its October 1, 2020 overpayment decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 20, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board